

STATE OF MICHIGAN  
COURT OF APPEALS

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BARBARA and GERALD CORNELIUS,

Plaintiffs-Appellants,

V

K.M. JOSEPH, M.D., BLUE WATER  
VASCULAR CLINIC, and ST. JOHN HEALTH  
SYSTEM,

Defendants-Appellees.

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UNPUBLISHED  
February 21, 2003

No. 237956  
St. Clair Circuit Court  
LC No. 00-002403-NH

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We affirm in part and reverse in part.

Defendant K.M. Joseph, a vascular surgeon, treated plaintiff Barbara Cornelius for leg pain in 1996 and 1997. On October 28, 1996, he began treating her symptoms with the first of a series of sclerotherapy treatments. On March 13, 1997, plaintiff Barbara Cornelius had an adverse reaction to the sclerotherapy treatment. Thus, she sought to recover damages. The complaint alleged that defendant Joseph negligently: (i) failed to obtain her informed consent before starting the sclerotherapy treatments (the "informed consent" issue); (ii) selected sclerotherapy as an appropriate treatment for leg pain (the "treatment selection" issue); and (iii) performed the sclerotherapy treatment in March 1997 (the "performance" issue). The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10).

On appeal, plaintiffs challenge the trial court's dismissal of the performance issue claim pursuant to MCR 2.116(C)(10). We review de novo a trial court's ruling on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

However, we have also ruled that “negligence is not established if the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses.” *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). We further noted:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Id.* at 285-286.]

“Expert testimony is required in medical malpractice cases to establish the applicable standard of care and to demonstrate that the defendant somehow breached that standard.” *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994).

Here, despite plaintiffs’ allegation that defendant Joseph negligently performed the March 13, 1997, sclerotherapy treatment, plaintiff’s expert could not opine whether defendant Joseph’s technique was “appropriate” or “inappropriate.” In fact, the expert opined that defendant Joseph’s negligence was limited to the treatment selection and informed consent issues. Thus, there is no expert testimony establishing that defendant Joseph’s technique in performing the injections deviated from an appropriate standard of care. *Birmingham, supra* at 421. Therefore, the trial court did not err in granting defendants’ motion for summary disposition as to the performance issue. *Haliw, supra* at 301-302.

Plaintiffs also challenge the trial court’s ruling that the treatment selection and informed consent issues were time-barred. In support of their motion for summary disposition pursuant to MCR 2.116(C)(7), defendants noted that the sclerotherapy treatments began on October 28, 1996. Thus, defendants contended that plaintiffs had until October 28, 1998, to file their complaint. Defendants further noted that plaintiffs’ notice of intent was dated October 14, 1998, about thirteen days before the statute of limitations expired. Defendants recognized that the notice of intent tolled the statute of limitations for 182 days, thereby extending the limitation period through April 27, 1999. Thus, plaintiffs’ complaint, dated August 31, 1999, was filed “125 days after the limitations period expired.”

When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept the nonmoving party’s well-pleaded allegations as true and “construe the allegations in the nonmovant’s favor to determine whether any factual development could provide a basis for recovery.” *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). “The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties . . .” *Id.*

Here, plaintiffs do not challenge the above dates and mathematical calculations. Instead, the primary issue to be decided is when the treatment selection and informed consent claims “accrued.” MCL 600.5838a(1) provides as follows: “[A] claim based on the medical malpractice of a person or entity . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” In *McKiney v Clayman*, 237 Mich App 198, 202; 602 NW2d 612 (1999), we

explained that MCL 600.5838a(1) requires courts to examine the basis of a plaintiff's malpractice action to determine the accrual date.

Here, plaintiffs' treatment selection issue contends that defendant Joseph negligently selected sclerotherapy as a treatment for leg pain. Indeed, plaintiffs' expert opined that sclerotherapy is primarily used for varicose veins, not for leg pain. However, we agree with defendants' contention that the decision to use sclerotherapy treatment had to have taken place no later than October 28, 1996. In fact, plaintiffs do not cite any evidence indicating that the subsequent treatments—such as the March 13, 1997 treatment—were anything other than an implementation of the original treatment selection. See *McKiney, supra* at 204-207. Consequently, we are not persuaded that the trial court erred in ruling that the treatment selection issue was time-barred. *Diehl, supra* at 123.

In regard to the informed consent issue, plaintiffs' expert specifically opined that defendant Joseph's failure to obtain plaintiff Barbara Cornelius's informed consent before starting the sclerotherapy treatment was a breach of the appropriate standard of care. At the very least, plaintiffs seek to recover for the treatment on March 13, 1997. Thus, we must determine if the accrual date for the March 13, 1997 treatment was either: (a) March 13, 1997, the date that defendant Joseph treated plaintiff Barbara Cornelius without her consent, and also the date that plaintiff Barbara Cornelius alleges she was harmed; or (b) on or before October 28, 1996, when defendant Joseph should have obtained plaintiff Barbara Cornelius's informed consent before beginning the sclerotherapy treatment.

It should be noted that "Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent." *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). "Accordingly, if a physician treats or operates on a patient without consent, the physician has committed a battery and may be required to respond in damages." *Id.* In other words, a physician may not treat a patient without having first obtained informed consent. Where, as here, there is a course of treatment, we do not believe that the failure to obtain a patient's informed consent before the *initial* treatment eliminates the need for obtaining the patients' informed consent before *subsequent* treatments. Thus, we believe that if defendant Joseph *never* obtained plaintiff Barbara Cornelius's informed consent, a separate accrual date would result from each treatment undertaken. Therefore, in the absence of a finding that plaintiff Barbara Cornelius gave a proper informed consent, we conclude that the trial court erred as a matter of law in ruling that plaintiffs' informed consent claim based on the March 13, 1997, treatment was time-barred. *Diehl, supra* at 123.

To be sure, defendants claim that plaintiff Barbara Cornelius was properly informed of the risks and consented to the sclerotherapy treatment. Indeed, attached to defendants' brief is a form that purports to have her signature. However, plaintiff Barbara Cornelius attested that she never signed the purported informed consent form. Thus, there is a factual development that could support plaintiffs' claim; therefore, summary disposition on the informed consent claim was premature. *Diehl, supra* at 123.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ William C. Whitbeck, C.J.

/s/ Richard Allen Griffin

/s/ Donald S. Owens